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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION 4

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN FRANCIS BUTLER,  
BRIAN KEITH HUTTON,

Defendants and Appellants.

A140433 & A140294

(Sonoma County  
Super. Ct. No. SCR608760)

Bryan Francis Butler and Brian Keith Hutton appeal their convictions following their no contest pleas to possession of marijuana for the purpose of sale. Appellants contend that the trial court erred in denying their motions to suppress and motions to quash and traverse because the initial search of the residence at issue was not justified as a “protective sweep,” because evidence offered in support of the search warrant was derived from the discovery of marijuana in a suitcase which the trial court suppressed, and because the affidavit in support of the warrant contained various material omissions and misstatements. We affirm.

**I. BACKGROUND**

**A. *Suppression Hearing***

At about 10:59 p.m. on October 2, 2011, Sergeant Heiser responded to a call regarding two suspicious males in the area of 1805 Holiday Street in Santa Rosa. The call indicated that one of the males had just crawled under a white pickup truck, and that the other had long hair and a dark complexion. As Sergeant Heiser was en route he heard

Officer Avina, who was on the scene, state over the radio “that he had located a subject and found that subject—or found—also found a firearm.”

When Officer Avina contacted the first subject, Gregory Ealey, Ealey was wearing rubber gloves, which he tried to discard, and carrying a handgun, which he placed on top of the tire in the wheel well of a white pickup truck. Ealey stated to Officer Avina that he had been to 1805 Holiday Street to purchase “three zips” of marijuana. The officers suspected that Ealey and his at-large comrade “were possibly getting ready to—or had just been involved in a robbery in the neighborhood,” and “were concerned that the second subject was still in the area and was possibly armed.”

The officers proceeded to 1805 Holiday Street. Officer Albini recognized a pickup truck in the driveway and had previously been given information that the owner of that vehicle was possibly involved in marijuana sales and cultivation. Sergeant Heiser walked around the exterior of the house and then approached the front door, which contained a large window partially covered by black plastic. Sergeant Heiser saw appellant Butler inside the house placing tape on additional black plastic. When Sergeant Heiser knocked on the door several times and loudly announced the police presence, Butler retreated inside the residence and out of sight.

Officer Wilhelm recognized another vehicle in the driveway from a traffic stop earlier in the week, and obtained the phone number of the registered owner’s son, appellant Hutton. Officer Wilhelm then called appellant Hutton, who at first claimed to be at his girlfriend’s house but eventually admitted to Sergeant Heiser that he was inside the residence at 1805 Holiday. Sergeant Heiser then asked Hutton to come to the front door, which he did.

Appellant Hutton told Sergeant Heiser that he had not come to the door when Heiser first knocked because “he was in fear that he was going to be robbed.” Heiser asked if there was anyone else inside the house, and Hutton called appellant Butler and Ritz Guggiana to the door. Heiser asked if anyone else was inside, and Hutton said no. Heiser and two other officers then conducted a protective sweep of the residence.

In the course of Sergeant Heiser's sweep of the house he found a locked door. He asked appellant Hutton, who was still at the front door, what was inside, and Hutton replied that "he had the beginnings of a small marijuana grow in there." Sergeant Heiser then asked Hutton to open the door, and Hutton retrieved the key from a kitchen drawer and did so. Inside the room, Heiser found several suitcases. Heiser unzipped one large suitcase a few inches, pointed his flashlight inside, and saw packaged marijuana. Shortly thereafter Sergeant Heiser contacted on-call narcotics officers. On-call narcotics Officer Vaughn Andrews subsequently arrived at the scene, searched the house, and prepared an affidavit in support of a search warrant. After the warrant was issued and executed, appellants were placed under arrest.

Appellants moved to suppress all the evidence obtained from inside 1805 Holiday, including the marijuana found inside the suitcase, arguing that Sergeant Heiser's warrantless entry into the home and search of the suitcase were not justified as a "protective sweep." The trial court found that the protective sweep was justified based on the totality of the circumstances, but that the search of the suitcase located in the locked room was unreasonable. In light of the trial court's suppression of the marijuana found inside the suitcase, appellants then filed motions to quash and traverse the search warrant, arguing that absent the marijuana there was not enough remaining evidence in the affidavit to support a finding of probable cause.

***B. Hearing on the Motions to Quash and Traverse***

Aside from his qualifications, the affidavit prepared by Officer Andrews contained the following summary of his investigation:

"On 10/3/2011 at approximately 1000 hrs I was contacted by Sgt Heiser regarding an investigation that had been initiated by Ofc Avina. Sgt Heiser advised me that Ofc Avina had responded to the area of 1805 Holiday St for a report of suspicious subjects in the area. An area resident had called SRPD to report that there were two 'dark male subjects' who had been loitering in the area for several minutes.

"When Ofc Avina arrived on scene he saw a black male on the side walk across the street and just north of 1805 Holiday St. As Ofc Avina stopped and exited his patrol vehicle, the black male ducked down behind a

pickup truck. The subject then began walking northbound on Holiday St away from Ofc Avina. Ofc Avina ordered the subject to stop and walk back toward him at which time Ofc Avina observed the male throw an unknown object to the ground. Ofc Avina contacted the male subject and detained him in handcuffs.

“Ofc Avina searched the area near the truck where the black male had ducked down. Ofc Avina observed a handgun on the tire under the wheel well of the truck. Sgt Heiser advised me that all the vehicles had condensation on them due to the weather however Ofc Avina advised him that the handgun was warm to the touch as if it had just been placed there. Ofc Avina also located latex gloves near the area where the male subject had thrown something when walking away. A search of the immediate area was conducted and a second subject was not located.

“Ofc Avina conducted a records check on the male subject, Gregory Ealey, and learned that he was currently on Parole for 245(a)(1) PC through 2014. Ofc Avina asked the male what he was doing in the area. Ealey pointed to the home which is 1805 Holiday St and said that he had come to purchase ‘three zips’ of marijuana from someone at the home. Based on my training and experience I am aware that ‘zips’ is a street term referencing ounces of a specific narcotic. Sgt Heiser advised me that Ofc Avina searched Ealey and had located approximately \$500 in cash. Ealey told Ofc Avina that there were three white male subjects inside the residence at this time.

“Sgt Heiser stated that he attempted to make contact with the residents at 1805 Holiday St. Sgt Heiser stated that he was concerned for their safety based on the fact that a Parolee had been contacted with a gun outside of the residence and had admitted that he was going to the residence to purchase marijuana. Sgt Heiser advised me that he was further concerned for the safety of the residents because only one of the males that had been reported in the area had been located. Sgt Heiser feared that a second subject may be in the residence holding the occupants hostage.

“Sgt Heiser told me that he walked to the front door and began to knock. He could see through the window on the front door. He could see a white male kneeling on the floor inside the residence. The male was placing tape over a plastic bag. As Sgt Heiser knocked on the door the white male got up and retreated toward the rear of the house. Sgt Heiser had additional units respond to the residence and a perimeter was established. Sgt Heiser knocked several times with no response. Sgt Heiser said he walked around the residence and could see inside most of the

windows. The house appeared to be sparsely decorated. Sgt Heiser advised he could see marijuana shake material on the ground around the residence as well as planters.

“Sgt Heiser stated that through a local records check Ofc Wilhelm was able to locate a phone number for one of the residents, Brian Hutton. Ofc Wilhelm called the phone number and spoke with a male who identified himself as Hutton. Hutton initially told Ofc Wilhelm that he was at his girlfriend’s house. He then admitted that he was home and was afraid to answer the door because he believed he was being robbed. When told the police were outside Hutton emerged from the rear of the house and opened the front door. Sgt Heiser asked why he did not answer the door and Hutton said because he believed someone was outside planning to rob him of his weed.

“Sgt Heiser conducted a protective sweep of the residence. Two other subjects were located inside the residence. They were identified as Ritz Guggiana and Bryan Butler. Sgt Heiser located a locked bedroom door in the northwest section of the residence. Hutton provided Sgt Heiser with a key to enter the bedroom to make sure no one was injured. Inside the bedroom Sgt Heiser observed several suitcases of various sizes. One suitcase was large enough for a person to hide in so Sgt Heiser unzipped it to make sure no one was hiding inside. Sgt Heiser could see several bags of processed marijuana bud in vacuum sealed bags inside the suitcase. Sgt Heiser also advised me that this bedroom along with garage were being converted into marijuana grow rooms.

“I responded to the scene as the On-call Narcotics Detective. I entered the residence and saw that the window to the front door had been partially covered with dark colored plastic bags. The garage door had been covered with sheet rock material to make the door inaccessible from the outside. In the northwest bedroom I saw several suitcases and two open ones that contained processed marijuana. This room appeared to be in the process of being converted into a marijuana grow room as well.

“I contacted Hutton and read him his rights per Miranda which he stated he understood. I asked if he lived at the residence and he stated that he lived here with his roommate Ritz. I asked him about the marijuana that was seen in plain view in the bedroom. Hutton stated he wanted to speak with his lawyer. I ended my conversation with him.

“I then contacted Guggiana and read him his Miranda rights which he stated he understood. Guggiana stated that he has been living at the

residence for four months. When I asked him if he had a marijuana recommendation he stated he wanted to speak with a lawyer. I ended my conversation with him.

“I then contacted Butler and advised him of his Miranda rights which he stated he understood. Butler said he lived at 3868 Crestview Dr. He said he was here visiting Hutton and Guggiana. I asked about the marijuana in the residence. Butler said he did not know anything about the marijuana. I asked Butler if he had a medical marijuana recommendation. He said yes and showed me a California state issued medical marijuana card. I advised him that I believed he knew more information about the residence. Butler then said he was not going to say anything to get anyone in trouble. I ended my conversation with him at this time.

“I conducted a records check on Hutton and saw that he has a prior arrest in September 2010 for possession of marijuana less than 28.5 grams. I had Officers place Hutton, Guggiana and Butler under arrest for 11359 HS, possession of marijuana for sale. All three subjects were transported to the police station.

“Based on my training and experience I formed the opinion that the residence was being used as a marijuana cultivation operation. Subjects that cultivate marijuana often will seal off the residence to prevent light from entering the residence but also to keep outsiders from being able to see inside as well. Ealey also made statements to Ofc Avina that he had come to the residence to purchase marijuana. Ealy [sic] was also aware that there were three white male subjects inside the residence. I believe the marijuana inside the residence was not being used for medical purposes and [was] being possessed for the purpose of sales. I believe a search of the residence will reveal contraband consistent with an illegal marijuana growing operation and sales of marijuana.”

After a hearing, the trial court denied the motions to quash and traverse. The trial court found that the observations made during the protective sweep, together with the totality of the circumstances, provided enough probable cause for a warrant even absent the discovery of the marijuana in the suitcase and the observations of Officer Andrews. The trial court also found that appellants were not entitled to a hearing under *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*) based on the alleged false statements and

omissions in the affidavit, because no material information had been omitted and the balance of the affidavit supported a finding of probable cause.

## II. DISCUSSION

### A. *Standard of Review and Applicable Law*

In reviewing a ruling on a motion to suppress, we defer to the trial court's factual findings, express or implied, when supported by substantial evidence. (*People v. Ayala* (2000) 24 Cal.4th 243, 279.) The power to judge credibility, weigh evidence, and draw factual inferences is vested in the trial court. (*People v. James* (1977) 19 Cal.3d 99, 107.) However, in determining whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1507.)

A defendant seeking to quash a search warrant has the burden of establishing its invalidity. (*Theodor v. Superior Court* (1972) 8 Cal.3d 77, 101.) “In reviewing the magistrate's determination to issue the warrant, it is settled that ‘the warrant can be upset only if the affidavit fails as a matter of law [under the applicable standard announced in *Illinois v. Gates* [(1983)] 462 U.S. [213], 238] to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony. [Citations.]’ [Citation.]” (*People v. Hobbs* (1994) 7 Cal.4th 948, 975.) Thus, “[t]he magistrate's determination of probable cause is entitled to deferential review.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1041.)

Finally, under *Franks*, defendants have “a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. The trial court must conduct an evidentiary hearing only if a defendant makes a substantial showing that (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit’s remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause.” (*People v. Scott* (2011) 52 Cal.4th 452, 484, citing *Franks*, *supra*, 438

U.S. at pp. 154-156.) We review denial of a *Franks* hearing de novo. (*People v. Panah* (2005) 35 Cal. 4th 395, 457.)

**B. *Sergeant Heiser's Warrantless Search Was Justified as a "Protective Sweep"***

Appellant Hutton argues that the trial court erred in concluding that Heiser's warrantless search of the house was justified as a "protective sweep," because two hours elapsed between the time that officers first responded to a report of two suspicious persons in the neighborhood and Heiser's entry into the property. (*See Maryland v. Buie* (1990) 494 U.S. 325, 336-337.) According to Hutton, these two hours, together with the lack of any signs of forced entry to the home, rendered a protective sweep unreasonable and unnecessary.

We are not persuaded. Sergeant Heiser originally arrived on the scene in response to a call reporting two suspicious males in the area, and after Ealey's arrest, Sergeant Heiser and Officer Avina "were concerned that the second subject was still in the area and was possibly armed." Heiser already had information, (including the tip from Ealey and Officer Albin's information regarding the vehicle in the driveway) suggesting that 1805 Holiday was the site of ongoing narcotics activity, in which firearms are " "tools of the trade" " and transients may be " 'in and out of [the] house at all times of the day or night.' " (*See People v. Ledesma* (2003) 106 Cal.App.4th 857, 865.) Adding to Heiser's suspicion, Hutton responded to Heiser's knocking and announcing police presence by retreating into the house, and when contacted by phone, initially denied being inside the residence. Heiser testified that he was fearful that there were additional people inside the house, either the missing second suspect or additional people being held against their will. Under these circumstances, Heiser was justified in conducting a protective sweep of the residence. (*See People v. Ledesma, supra*, 106 Cal.App.4th at pp. 867-868.)

**C. *The Modified Affidavit Does Not Lack Probable Cause***

Hutton next contends that the trial court erred in failing to excise all the observations of Officer Andrews included in his affidavit in support of the warrant because Officer Andrews would never have been called to 1805 Holiday if not for the



discovery of the marijuana resulting from the search of the suitcase, which the trial court found unconstitutional.

Where an affidavit supporting a search warrant contains both information obtained by unlawful conduct as well as untainted information, a two-prong test applies to justify application of the independent source doctrine. (*People v. Weiss* (1999) 20 Cal.4th 1073, 1081.) First, the affidavit, excised of any illegally obtained information, must be sufficient to establish probable cause. (*Ibid.*) Second, the evidence must support a finding that “the police subjectively would have sought the warrant even without the illegal conduct.” (*Id.* at p. 1079.)

We agree with the trial court that it is not necessary to address whether the entirety of Andrews’s observations were prompted by the illegal search of the suitcase, because even when those observations are excised from the affidavit, the balance supports a finding of probable cause. (*See People v. Weiss, supra*, 20 Cal.4th at p. 1081.) In particular, the affidavit describes the statement by Ealey to Sergeant Heiser that he had come to 1805 Holiday to purchase three “ ‘zips’ ” of marijuana, that Ealey was carrying \$500 in cash and knew that there were three white male subjects at 1805 Holiday at the time, that upon approaching the residence, Sergeant Heiser saw a white male inside placing tape on black plastic in an apparent effort to block the windows, that the house appeared to be sparsely decorated, that Heiser observed planters and marijuana shake material outside the residence, and that when Heiser knocked and announced police presence, Hutton did not answer the door but rather retreated out of view into the house . We view these observations as sufficient to establish a “fair probability that contraband or evidence of a crime” would be found inside 1805 Holiday. (*Illinois v. Gates, supra*, 462 U.S. at p. 238.)

Second, we agree with the trial court that the police would have sought the warrant even absent the discovery of the marijuana in the suitcase and Officer Andrews’s visit to the scene. (*See People v. Weiss, supra*, 20 Cal.4th at p. 1079.) Ealey had told Officer Avina that he was headed to 1805 Holiday to purchase marijuana, Sergeant Heiser had observed black plastic partially blocking the window in the front door and Hutton

applying tape to more black plastic inside the house, one of the officers recognized a vehicle in the driveway and “had been given information previously that the owner of that vehicle was involved in possible marijuana sales and cultivation,” and Hutton had expressly told Sergeant Heiser before he looked inside that the locked room in the home contained “the beginnings of a small marijuana grow.” These facts are enough to conclude that the police “subjectively would have sought the warrant even without” the discovery of marijuana in the suitcase and the subsequent observations of Officer Andrews. (*Id.* at p. 1079.)

**D. *Appellants Were Not Entitled to a Franks Hearing***

Appellants contend that they were entitled to an evidentiary hearing under *Franks* because the affidavit contains numerous statements that were “made in reckless disregard of the truth,” namely: (1) that the suitcase in which marijuana was found “was large enough for a person to hide in”; (2) that Andrews stated he was told by Heiser that Heiser saw marijuana “shake” outside the residence although Heiser’s testimony failed to corroborate that statement; (3) that Hutton said he failed to answer the door because he was afraid he would be robbed “of his weed,” as opposed to simply “robbed”; and (4) the omission from the affidavit of various alleged misrepresentations of Ealey. The trial court found that there was no material false information in the affidavit and that even excluding the challenged information, the balance of the warrant contained enough information to support a finding of probable cause.

With respect to the statement regarding Sergeant Heiser’s observation of “shake” outside the residence, we agree with the trial court that appellants have not carried their burden to demonstrate that the statement was “deliberately false” or “made in reckless disregard of the truth” simply because neither Heiser’s testimony nor his police report made mention of the shake. (*People v. Madrid* (1992) 7 Cal.App.4th 1888, 1899 [substantial preliminary showing required for *Franks* hearing requires “focus on the state of mind of the affiant”].) We also agree with the trial court that even if the allegedly false information, with the exception of the observation of shake, is excised from the warrant, there is enough remaining material to support a finding of probable cause such

that no *Franks* hearing was required. (*People v. Mayer* (1987) 188 Cal. App.3d 1101, 1120 (*Mayer*) [“If the affidavit otherwise contains facts sufficient to support a finding of probable cause after the false information is ‘set to one side,’ no hearing on the alleged inaccuracies is required”].) Excising the allegedly false information from the affidavit leaves behind the various facts supporting a finding of probable cause discussed above in connection with the first prong of the *Weiss* test (with the exception of Sergeant Heiser’s observation of shake), including Ealey’s statement that he went to 1805 Holiday to purchase marijuana, and Heiser’s observation of Hutton placing tape on black plastic bags. These facts are sufficient to support a finding of probable cause.

Appellants final contention is that the affidavit should have included the potential criminal charges against Ealey, as well as the fact that he initially denied being connected to the gun found nearby and claimed to have been “cool[ing] off” after a fight with his girlfriend before admitting that he had been to 1805 Holiday to purchase marijuana. These omissions are material to the finding of probable cause only insofar as they go to Ealey’s credibility, but the affidavit does disclose that Ealey was on parole and was detained by Officer Avina because of his possession of the gun. This was sufficient to put the magistrate on notice of his potential unreliability. (*People v. Kurland* (1980) 28 Cal.3d 376, 393-394 [“We therefore conclude that, in most cases, the issue of possible unreliability is adequately presented to the magistrate when the affidavit reveals that the affiant’s source of information is not a ‘citizen-informant’ but a garden-variety police tipster”]; *Mayer, supra*, 188 Cal.App.3d at p. 1121 [“details of an informant’s reliability and criminal history are not material matters which must be included in an affidavit in support of a search warrant”].) In sum, appellants were not entitled to a *Franks* hearing and the trial court did not err in declining to hold one.

### **III. DISPOSITION**

The judgments are affirmed.

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REARDON, J.

We concur:

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RUVOLO, P. J.

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STREETER, J.